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No. 95-1643

In The

# Supreme Court of the United States

October Term, 1995

CRIST ELLIS AND NORMA WONG-LARKIN,

*Petitioners,*

v.

UNITED AIR LINES, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether this Court should grant a petition for certiorari to review the Tenth Circuit's conclusion that the disparate impact theory of liability is not available under the Age Discrimination in Employment Act when that decision conforms with this Court's prior rulings and the decisions of other circuit courts.

2. Whether this Court should grant a petition for certiorari to decide whether the Tenth Circuit's conclusion that United's use of weight standards for flight attendant applicants did not violate the purposes of the Airline Deregulation Act is erroneous.

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## STATEMENT OF THE CASE

### A. Factual background.

Petitioners Crist Ellis and Norma Wong-Larkin (herein "Petitioners") are former Frontier Airlines flight attendants who applied to work for Respondent United Air Lines, Inc. ("United") following Frontier's declaration of bankruptcy. At that time, United required all flight attendant applicants to meet certain weight guidelines, based upon the applicant's height. United also maintained a height/weight chart for existing employees which contained variances based upon the age of the flight attendant employee. Although the Petition attempts to make controversial the fact that United utilized two different weight charts, it was undisputed below that United implemented the employee chart as a result of collective bargaining between the Company and the flight attendant union. Petitioners' Appendix, p. 18a.

Petitioners did not meet United's height/weight requirements for flight attendant applicants when they applied. *Id.*, p. 15a. As a result, Petitioners were not offered positions as flight attendants.

At the time they applied, Petitioners were protected employees under the Airline Deregulation Act ("ADA"), 49 U.S.C. app. § 1552 (1988) (codified as amended at 49 U.S.C. § 42101 *et seq.* (West 1994)). Section 43(d) of the ADA grants preferential hiring treatment by covered air carriers to protected employees who lost their jobs as a direct result of the deregulation of the airline industry. 49

U.S.C. app. § 1552(d).[1] Before an employee will be entitled to such preferential treatment, however, the employee must meet the air carrier's noncompetitive hiring prerequisites. 29 C.F.R. § 220.21(a). Because Petitioners did not meet United's height/weight qualifications for flight attendant applicants, Petitioners were not given preferential hiring treatment.

**B. Procedural history.**

After United rejected their applications, Petitioners filed a lawsuit claiming that United's failure to hire them violated both the ADA and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* The district court entered summary judgment against Petitioners on both claims.[2] Assuming without deciding that a disparate impact claim was cognizable, the district court nevertheless found that Petitioners failed to state a

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[1] United is one of the air carriers covered by § 43 of the Airline Deregulation Act. 29 C.F.R. § 220, App. I.

[2] In their Brief opposing United's Motion for Summary Judgment, Petitioners argued both the disparate impact and disparate treatment theories of discrimination. However, at a hearing on the merits of United's Motion, the district court concluded that Petitioners abandoned their disparate treatment claim. Petitioners' Appendix, p. 35a. Thus, the district court only addressed Petitioners' ADEA claim under a disparate impact theory of liability. *Id.* On appeal, the Tenth Circuit disagreed with the district court's assessment that Petitioners intended to proceed only under the disparate impact theory of liability. *Id.*, p. 12a. Nevertheless, as set forth below, the Tenth Circuit found that Petitioners offered insufficient evidence to support the disparate treatment claim as a matter of law. *Id.*, pp. 14a-16a.

claim of age discrimination for three reasons: (a) Petitioners had no claim of disparate impact since Petitioners themselves admitted that they were capable of meeting United's weight requirements; (b) Petitioners failed to state a claim for disparate impact because they offered no evidence from which a fact finder could conclude that increasing weight has a correlation to advancing age; and (c) United offered evidence of a legitimate business justification for its decision to relax the height/weight standards for incumbent employees which Petitioners failed to show was a pretext for age discrimination. *Id.*, pp. 39a-41a.

On appeal, the Tenth Circuit affirmed the district court's decision. Addressing the ADEA claim, the Tenth Circuit first considered the disparate treatment theory. The court held that Petitioners failed to establish a *prima facie* case of disparate treatment because Petitioners failed to show that they were qualified for flight attendant positions at United, since they did not meet United's weight requirements for new hires and, in any event, failed to demonstrate that these weight requirements were a pretext to exclude older applicants.[3] *Id.*, pp. 14a-16a. The Tenth Circuit then concluded that Petitioners could not pursue their age discrimination claim under the disparate impact theory, on grounds that the disparate impact theory is not a cognizable theory of liability under the ADEA. *Id.*, p. 19a. Because the Tenth Circuit rejected

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[3] Petitioners have not sought review of the Tenth Circuit's conclusion that Petitioners failed to establish a genuine issue of fact as to whether United intentionally discriminated against them on the basis of their age.

the viability of this theory in the first instance, the Tenth Circuit did not reach the district court's findings on the merits of Petitioners' ADEA claim.

The Tenth Circuit also affirmed the district court's dismissal of Petitioners' ADA claim, concluding that United was entitled under the Act to apply *"any* prerequisites or qualifications determined by it" to designated employees, other than initial hiring age, so long as the qualifications do not defeat the purpose of the Act. *Id.*, pp. 28a-29a. (emphasis in original) (citations omitted). Because Petitioners failed to demonstrate that United's weight standards frustrated the purpose of the Act or were otherwise impermissible, the Tenth Circuit held that dismissal was appropriate. *Id.*, p. 29a.

## REASONS FOR DENYING WRIT

### I. CERTIORARI AS TO THE AVAILABILITY OF THE DISPARATE IMPACT THEORY OF LIABILITY UNDER THE ADEA SHOULD NOT BE GRANTED BECAUSE THE TENTH CIRCUIT'S DECISION CONFORMS WITH THIS COURT'S PRIOR RULINGS AND THE DECISIONS OF OTHER CIRCUITS.

#### A. The Tenth Circuit's Decision that a Disparate Impact Claim is Unavailable Under the ADEA is a Correct Decision Which is Consistent with this Court's Decisions and the Decisions of Other Courts.

Petitioners ask this Court to grant the Petition for Certiorari to determine whether the disparate impact theory should be available as an alternative means of proving discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*. The primary thrust of Petitioners' argument is their contention that "[i]ntervention is necessary to resolve a split in the circuits." Petition, p. 4. In fact, Petitioners have labored to create the appearance of a conflict among the circuit courts on an issue in which no clear conflict exists.

Congress enacted the ADEA in 1967 in response to a Report commissioned from the Secretary of Labor, entitled "The Older American Worker: Age Discrimination in Employment" (1965). That Report identified two kinds of age discrimination – "arbitrary discrimination" or intentional discrimination against older workers, and problems resulting from factors which merely "affect older workers more strongly, as a group, than they do younger employees." *Id.*, at pp. 5, 11. The stated purpose of the

ADEA, as set forth in 29 U.S.C. § 621(b), is to "prohibit *arbitrary* age discrimination in employment." (emphasis added). Thus, in enacting the age discrimination statute, Congress indicated its intent to focus upon intentional age discrimination in the workplace.

In 1993, this Court issued its unanimous opinion in *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993), in which the Court articulated the standard for claims of age discrimination:

> Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age . . . . When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . .

123 L. Ed. 2d at 347. Alluding to the Report which preceded the Act, the opinion confirmed the specific problems that the ADEA was enacted to redress: "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id.* Although this Court limited its holding to the disparate treatment theory before it, the decision clarified the kind of evidence which will support a claim of age discrimination.

In the wake of *Hazen Paper*, few courts have had the opportunity to address directly the viability of the disparate impact theory under the ADEA. Nevertheless, those courts which have faced the issue squarely have unanimously agreed that a disparate impact claim is *not* available to prove age discrimination. *DiBiase v. SmithKlein Beecham Corp.*, 48 F.3d 719 (3rd Cir. 1995); *EEOC v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 132 L. Ed. 2d 828 (1995); *Martincic v. Urban Redevelopment Authority*, 844 F. Supp. 1073, 1077-78 (W.D. Pa. 1994). The Tenth Circuit's decision in this case that disparate impact cannot be used to state a claim under the ADEA is clearly aligned with these recent decisions.

Petitioners' claim that the Tenth Circuit reached its decision by misconstruing *DiBiase* and the Sixth Circuit's opinion in *Lyon v. Ohio Educ. Association and Professional Staff*, 53 F.3d 135 (6th Cir. 1995), is without merit. Petitioners have attempted to create a conflict between the Tenth Circuit's opinion in this case and the holdings in *DiBiase* and *Lyon* which does not exist. Petitioners first claim that the Tenth Circuit erroneously interpreted *DiBiase* because that court never reached the disparate impact issue. Petition, p. 5. In fact, Judge Greenberg, writing for the plurality, states, "[m]oreover, in the wake of *Hazen*, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA." 48 F.3d at 732. The Sixth Circuit in *Lyon* likewise concluded, "There is considerable doubt as to whether a claim of age discrimination may exist under a disparate impact theory. . . . " 53 F.3d at 139 n.5. Thus, Petitioners' claim that the *Lyon* court's opinion was directly contrary to the Tenth Circuit's holding is inaccurate.

Indeed, even in those circuits in which the disparate impact theory may remain viable, courts have expressed considerable doubt as to whether the theory would be sanctioned if expressly challenged. *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1004 (5th Cir. 1996) (DeMoss, J., concurring and dissenting) (concluding that the disparate impact theory is not available under the ADEA in the wake of *Hazen Paper*); *Mangold v. California Public Utilities Commission*, 67 F.3d 1470, 1474 (9th Cir. 1995) (indicating reservation as to whether disparate impact should apply to ADEA claim, but failing to reach issue because jury found existence of disparate treatment); *Graffam v. Scott Paper Co.*, 1995 U.S. App. Lexis 17120 (1st Cir. July 14, 1995), at *8 (questioning the viability of disparate impact claim under ADEA in light of *Hazen Paper*, but assuming its applicability). Petitioners' citations to *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983), and *EEOC v. Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984), as contrary decisions are not persuasive. All of these cases were decided before the *Hazen Paper* decision was announced.

The Tenth Circuit's construction of the ADEA is consistent with the Act's legislative history, this Court's precedent in *Hazen Paper Co. v. Biggins*, and the conclusions of other courts which have addressed the issue to date. In light of this consensus and the clear trend toward rejecting the disparate impact theory as a means of proving discrimination under the ADEA, this Court should decline to exercise its discretion to consider the issue.

### B. This Case is not a Proper Vehicle for Resolving Issues Concerning the Viability of the Disparate Impact Theory Because Petitioners Failed to State a *Prima Facie* Claim in the Court Below.

It is the customary practice of this Court to refrain from accepting certiorari to consider an issue where a petitioner has failed to make a case that she is entitled to any relief on the merits. *See Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 89 (1970). The thrust of the Petition is that a decision by this Court to reverse the Tenth Circuit would revive Petitioners' age discrimination claim. In fact, as set forth below, the district court has already reached the merits of Petitioners' disparate impact claim and found in United's favor. Thus, even if issues concerning the availability of a disparate impact claim under the ADEA warrant this Court's examination now, this case is not a proper vehicle to resolve that dispute.

The district court chose not to address the issue of whether a disparate impact theory was available in the first instance, but instead assumed its applicability and concluded that, applying that analysis, Petitioners could not withstand summary judgment on their ADEA claim. First, the district court found that Petitioners failed to offer *any* evidence of a correlation between advancing age and increasing weight. Petitioners' Appendix, p. 40a. To prove disparate impact, a plaintiff must offer evidence "of a kind and degree" sufficient to show that the practice does in fact disparately impact members of the protected group in order to meet her burden of proof. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988). The

complete failure by Petitioners to offer such evidence below justified the district court's decision to dismiss Petitioners' disparate impact claim on the merits.

Alternatively, the district court found that Petitioners could not state a valid claim because both had testified that they could control their weight generally and could have met United's applicant height/weight requirements at all relevant times. Petitioners' Appendix, pp. 39a-40a. In reaching this conclusion, the district court relied upon *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981), in which the Fifth Circuit held that there is no disparate impact if a requirement is one that the affected applicant can readily observe. *Id.*

Because Petitioners' disparate impact claim was addressed and found to be insufficient on the merits below, a decision by this Court will have little effect on the outcome of this case. This Court should reserve the opportunity to address the issues raised in the Petition for a case in which the petitioner is otherwise entitled to relief on the merits.

## II. THIS COURT SHOULD NOT REVIEW THE STANDARD OF PROOF FOR A CLAIM BROUGHT UNDER THE AIRLINE DEREGULATION ACT IN THIS CASE BECAUSE: (1) OF THE NEED TO RECONSIDER FACTUAL FINDINGS; (2) THE ISSUE IS NOT IN DISPUTE AMONG THE CIRCUIT COURTS; AND (3) REVIEW BY THIS COURT WOULD HAVE LIMITED PRECEDENTIAL VALUE.

Petitioners ask this Court to grant certiorari to determine the proper burden of proof in an Airline Deregulation Act claim, contending that the Tenth Circuit erred in requiring them to prove that United's hiring prerequisites were pretextual and further charging, "[t]here were clearly factual issues in dispute" as to whether Petitioners demonstrated that United's applicant height/weight requirements frustrated the purpose of the ADA. Petition, p. 11. There are three principal reasons why this court should not grant certiorari to consider these issues – first, because the Petition requires the Court to review the factual determinations of the lower courts; second, because the Tenth Circuit's determination in this case is a proper interpretation of the ADA which is not in conflict with any other court decision; and finally, because any decision by this Court would have limited value, since the ADA by its very terms affects a finite number of individuals.

### A. The Issues Presented by Petitioners Require the Court to Review Factual Determinations Made by Lower Courts.

The ADA does not mandate that an airline hire applicants protected by the statute who do not meet the air

carrier's noncompetitive hiring prerequisites. 29 U.S.C. § 220.21(a). In this case, neither Petitioner met United's weight requirements for applicants of their height. Petitioners' Appendix, p. 15a. Petitioners concede: "Weight requirements are permissible job-related criteria for flight attendants." Petition, p. 8. The Tenth Circuit found that: "Plaintiffs have also failed to introduce any evidence that the weight standards acted generally to frustrate the first hire rights of designated employees by preventing them from getting hired." Petitioners' Appendix, p. 29a.

Nevertheless, Petitioners claim that an air carrier cannot impose job criteria upon applicants which defeat the purpose of the ADA, and further contend that the Tenth Circuit erred in affirming the district court's decision to grant summary judgment as to this claim, stating: "In short, Petitioners produced evidence from which a reasonable fact-finder could have concluded that under the ADA United's height-weight requirement 'defeats the purpose of the Act' and was designed to deny 'protected employees' their first right of hire." Petition, p. 10.

This Court should not issue a writ of certiorari to determine the sufficiency of factual findings, especially when two courts have thoroughly reviewed the issue. This Court should not create a space in its docket to determine an issue which has little precedential value for lower courts.

**B. The Tenth Circuit's Imposition of the Burden of Proof Upon Petitioners is a Correct Interpretation of the Statute Which Does Not Conflict with the Decisions of any Other Circuit Courts or this Court.**

Petitioners argue that the Tenth Circuit imposed an erroneous burden upon them. Petition, p. 11. Yet, Petitioners cite to no precedent to support their proposition that the Tenth Circuit misconstrued the applicable standard of proof. Petitioners likewise point to no other decisions which would indicate a conflict between courts meriting this Court's attention. In fact, the lack of support for Petitioners' position is not surprising because the Tenth Circuit is the first circuit to address the issue directly, and its conclusions are consistent with the decisions reached by other courts who have analyzed the ADA.

The Tenth Circuit's construction of the standard of proof for a claim under the ADA is well-reasoned. The Tenth Circuit concluded that a plaintiff who seeks to invalidate an air carrier's noncompetitive employment requirement must demonstrate that the requirement frustrates the purpose of the Act by generally preventing designated employees from being hired. Petitioners' Appendix, p. 29a. The Tenth Circuit further concluded that, to the extent Petitioners contended that the height/weight requirements violated the statute by limiting the employment opportunities of designated employees on the basis of "initial hiring age", Petitioners bore the burden of proving that these requirements were a pretext for artificially maintaining younger entry-level hires. *Id.*, pp. 27a-28a.

The Tenth Circuit's decision is entirely consistent with the D.C. Circuit's opinion in *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995), the only other court which has confronted this issue. There the D.C. Circuit was presented with circumstances substantially similar to the circumstances here. Crocker, a pilot who was entitled to first-hire rights, brought a claim against Piedmont after Piedmont refused to hire him based upon its policy against hiring any pilot whose license had been suspended by the Federal Aviation Administration. 49 F.3d at 738. Crocker claimed that Piedmont's real motivation for turning down his application was age, in contravention of the express provisions of the ADA. *Id.* Although reversing the entry of summary judgment, the D.C. Circuit indicated that Crocker, *not* Piedmont, bore the burden of proving that the reasons relied upon by Piedmont to reject his application were a pretext for limiting his opportunities on the basis of initial hiring age. *Id.* at 749-50.

Given the limited number of decisions addressing § 43(d) rights in general and the consistency found in those opinions which have confronted the issues raised by this Petition, Petitioners have not advanced any basis under S. Ct.R. 10 for this Court to issue a writ of certiorari.

### C. A Decision to Grant Certiorari in this Matter Would Have Limited Precedential Value Because the ADA Covers a Finite Number of Individuals.

Congress enacted the Employee Protection Program of the Airline Deregulation Act to ease some of the problems expected as a result of deregulation of the airline industry. *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 737 (D.C. Cir. 1995). Those provisions were designed to give certain airline employees who lost their jobs as a result of deregulation during a ten-year deregulatory period *temporary* hiring preferences and financial assistance. 42 U.S.C. App. § 1552(d).

Although protected employees under the ADA remain entitled to a hiring preference, the number of individuals who may take advantage of the hiring preference provided by the ADA is finite. The Act only applies to employees terminated under certain conditions prior to October 24, 1988. *Id.* In addition, the ADA is of limited duration.[4] This Court should not grant certiorari over an issue involving a statute which will affect a limited number of individuals in a single industry, particularly given the likelihood that a claim under the ADA could expire at any time.

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[4] In 1994, the ADA was amended and recodified at 49 U.S.C. § 42101 *et seq.* Although no specific date was identified, the Act does contain a sunset provision at which point the Act will cease to be enforceable. 49 U.S.C. § 42106.

## CONCLUSION

For the reasons set forth above, this Court should deny the Petition for Writ of Certiorari.

Dated: May 10, 1996

Respectfully submitted,

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